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Mutations

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MUTATIONS

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INTRODUCTION

THE doctrine of mutations has a very important place in the community property law of Texas. Having no basis other than case law, the doctrine got a very early start in the Texas decisions as a result of its adoption from the Civil Law of Spain and Mexico.[1]

The effect of the mutations doctrine is to maintain the separate estates of the respective spouses intact throughout the marriage. The most important requirement in so doing is tracing the original separate property through its various changes and mutations to its present condition.[2]

Mutations is applied with uniformity, whether the property involved is separate or community. This has not always been true in the case of choses in action, which have not always been recognized as property.[3]

The doctrine is constitutional as applied to the wife's separate property, though the constitution's rigid definition[4] of such property includes only premarital property and property acquired during marriage by gift, devise, and descent. Property acquired

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[1] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 77 (1943); 2 *Id.* §§ 142 and 186.

[2] Jones v. Epperson, 69 Tex. 586, 7 S. W. 488 (1888).
Love v. Robertson, 7 Tex. 6 (1851).
King v. Gilleland, 60 Tex. 271 (1883).

[3] Martin v. McAllister, 94 Tex. 567, 63 S. W. 624 (1901).

[4] TEX. CONST. art. 16, § 15.

during marriage in exchange for such property does not come literally within the definition; but it is viewed as being such original property in a different guise or in a changed form.[5]

MUTATIONS—APPLIED IN CONTRASTING SPOUSE'S PROFITS FROM BUSINESS WITH SPOUSE'S ISOLATED PURCHASES AND SALES

Here the problem seems to resolve into one of public policy. The courts have been endeavoring to preserve and protect the separate estate of each spouse; they have also been attempting to make the attentions and labors of the spouses inure to the benefit of the community as far as is practicable. The former goal would be reached perfectly by applying the mutations principle uniformly to all purchases and exchanges made with separate property; the latter endeavor restricts the use of the mutations principle and would, if carried to the extreme, substitute a theory that would make almost any gain in the value of the separate estates, the property of the community when realized. It appears safe to say that if the property is clearly separate and if the sale is an isolated one (that is, free of any tinge of a sale for profit and prompt reinvestment), the mutations doctrine will be applied, and the funds or other property received from the sale will also be separate property.[6] It also appears safe to say that if a spouse is engaged in the business of buying and selling property, the profits become the property of the community.[7] Between these two extremes the rule is clouded, and conjecture as to the outcome of any case is beset with uncertainty.

The reason for the mutations rule is a simple one: the law of community property recognizes the separate estates of the spouses; therefore if the mutations rule were not applied, the spouses would have to maintain their separate estates in specie in order to main-

[5] Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799 (1925).

[6] Rose v. Houston, 11 Tex. 323 (1854).

[7] Richards Medicine Co. v. Jennings, 283 S. W. 296, (Tex. Civ. App., 1926), *writ of error dismissed;* Epperson v. Jones, 65 Tex. 425 (1886).

tain them at all. There would be no valid reason for a rule that would place such a restraint on alienation by making it fatal to their separate property rights.

The reason for the opposing rule is equally as simple. It is that the spouses should not use their labor, time, and attention, which should inure to the benefit of the favored community, for the benefit of the recognized, but subordinate, separate estates.

Two reasons seem to underlie the rule that the profits of a mercantile business are community property, even though the business is carried on with a spouse's separate funds.[8] First, there are numerous sales and purchases, requiring much community labor and supervision; second, tracing the original separate property through its many mutations is extremely difficult, and where tracing fails, the community presumption prevails. Therefore, the value of the initial separate property is considered the *corpus*, which remains separate property; and any increase in value is community profit.

An isolated sale where gain is realized could be analyzed as *corpus* and profit, but the aforesaid reasons do not exist: community labor is relatively slight and tracing is easy.

Such mercantile business was contrasted with an investment of the wife's separate money (by the husband, with her consent) in land, which increased in value and was sold for a net gain, the proceeds then being reinvested in land and this process being repeated through a period of half a dozen years.[9] The increased value was held to be the wife's separate property, in spite of the great amount of community attention required in procuring purchasers and writing deeds. It is extremely probable that the opposite result would be reached today; two principal bases of the decision have been changed, *viz.*, "increase of land" is now considered as probably meaningless,[10] in that probably no prop-

[8] Brittain v. O'Banion, 56 S. W. (2d) 249, (Tex. Civ. App., 1933), *writ of error dismissed;* Schwethelm v. Schwethelm, 1 S. W. (2d) 911, (Tex. Civ. App., 1927).

[9] Evans v. Purinton, 34 S. W. 350, (Tex. Civ. App., 1896), *writ of error refused.*

[10] Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799 (1925); see 23 Tex. Jur., *Husband and Wife,* § 52; Willcutt v. Willcutt, 278 S. W. 236 (Tex. Civ. App. 1925).

erty is separate property which would not be if the phrase were excised from the statutes[11] and the husband no longer manages the wife's separate property.

Judge Speer, in his *Marital Rights*, Section 367, emphasizes the intention of the spouse in the transaction as being the main factor; that is, whether the purchase of the item was to obtain profit or to obtain a permanent acquisition. (Doubtless, where the latter intent exists at the time of purchase, the item need not be permanently retained; the spouse can certainly change his or her mind.) He adds that there can be no distinction as to the type of property involved, except that it might shed light on the intention of the spouse with respect to the purchase. If the intention were an "enterprise," then the gain upon sale would represent the profit of the enterprise and become community property. If the intention were a permanent acquisition, then the gain upon later sale would be merely the enhancement of the property in the spouse's hands, and this gain would be separate property. Thus, for example, the contemplation of only a single transaction rather than repeated purchases and sales with separate funds would make an application of the mutations rule clearly correct. Judge Speer also warns that in order to protect the spouse's (particularly the wife's) separate estate, there must be a limit to the theory which makes the slightest attention on her part fatal to her right to the increase in value of her separate property.

Of course, the situation is very different when separate property is not sold but is retained. This latter topic is not really within the sphere of the mutations principle, and will be treated only cursorily. Comunity labor (including attention and supervision) in improving such separate property does not ordinarily affect the title, which remains separate. For example, increase in value of the wife's livestock due to the husband's good care belongs to the wife separately.[12] Community labor in producing a product

[11] TEX. REV. CIV. STAT. (Vernon, 1948) arts. 4613 and 4614.

[12] Howard v. York, 20 Tex. 670 (1858); Stringfellow v. Sorrels, 82 Tex. 277, 18 S. W. 689 (1891).

from separate property will not change the title to that property, but the product will be community property—*e.g.*, crops from separate land—apparently even though the community labor amounts to no more than slight supervision.[13] The result is accentuated by using community labor, directly or through employing agents, to sever the product.

The foregoing rules as to the effect of community labor seem to strike a good balance between the two policies enunciated *supra* (protecting the separate estates and giving the community the benefit of community labor). If separate property is sold, an increased value received in exchange will be separate property, unless there are enough sales to constitute a business, in which case the profit will be community property. If separate property is retained, its increased value, whether due to impersonal forces or to community labor, is separate property; its products (unless existing without community labor—*e.g.*, natural grass) are community property.

In summary of the mutation principle's application here, the property in question must be traced with certainty from its present condition through all of its mutations and changes to its source as separate property in order that its original separate character may now be maintained. If the fact situations warrant, the concept of a business, the intention of the spouse in purchasing the property, and the degree of community time, labor, and attention spent in selling the property may tip the scale for the favored community estate.

MUTATIONS—AS APPLIED TO LOTTERY TICKETS

One interesting Supreme Court case raises this problem.[14] A wife bought a lottery ticket for $1, her separate money, and

[13] Cleveland v. Cole, 65 Tex. 405 (1886); *compare* Craxton, Wood & Co. v. Ryan, 3 Will Civ. Case App. § 367, (1888) and White v. Lynch, 26 Tex. 195 (1862), where timber and hay were severed and then processed.

[14] Dixon v. Sanderson, 72 Tex. 359 (1888).

drew the prize of $15,000. Was the money hers separately, or was it community property?

The mutations rule would yield a very simple result. Since she bought the ticket and the contract right it represented with her separate money, they would clearly be her separate property. Her chose in action was highly contingent, but upon the happening of the contingency, it became a very solid right to the prize; it became immaterial that there ever was an "if" in the bargain. This contract right was a right to the prize money; it was that and nothing more. Therefore when the ticket was cashed, the prize should be her separate property. The transaction is even more closely knit than the ordinary mutations situation, and therefore should *a fortiori* reach the above result. Here there was, in a sense, a mutation, but it was more than that; it was not an independent, later conceived exchange, but really a part of the contract right, *viz.*, its performance.

This, however, is not the result reached in the above-cited case. The court stated the constitutional definition of the wife's separate property as that acquired before marriage and that acquired after marriage by gift, devise, or descent. The prize was acquired after marriage; therefore the court concluded that the prize must be a gift, a devise, or an inheritance in order to be her separate property. The court of course denied that it was any of these, and held that the prize was community property. In disposing of the mutations theory, the court recognized that when "property purchased or taken in exchange increases in value, this necessarily inures to the benefit of the owner," but continued: "Such a state of fact, however, is not before us, and we are constrained to hold that all profit realized on the purchase of the lottery ticket became community property."

However, "profit" seems not to be involved. Profit arises when there is a business—when property is kept and used to make money, or is sold and resold many times. A single purchase, as here, is surely not a business. The wife bought a contract right,

which proved to be surprisingly valuable; is there any substantial difference between that and buying seemingly worthless land as a long-shot oil investment and having it later produce oil?

The court may have been influenced by the overshadowing element of speculation, which Judge Speer says will make the proceeds community property,[15] on the basis that a large gain was sought. Of course, conservative investments (*e.g.*, buying suburban land—which if bought with separate money is separate property regardless of how it rises in value) are made for the sake of gain also; is there a major legal difference between the gain sought in one conservative investment and the gain sought in one speculative purchase? It would not seem so. Furthermore, holding the lottery proceeds to be community property would seem to require a holding that the contract right (and the ticket) were at the instant of spending the $1 of separate money therefor, community property—a result somewhat difficult to justify. Moreover, the court does not mention the word "speculation" or any synonym for it, and makes no argument as to illegality or as to the public policy against lotteries. The oil situation just mentioned is equally speculative and so are many stock market transactions; here where there is no adverse public policy involved, it would seem that a lucky single deal with separate money would yield separate property only. Should the public policy against lotteries (which the court did not mention) change separate property into community property? It would seem not.

If the result were doubtful, the community presumption would prevail,[16] but here the mutations principle seems to make the result clear.

Perhaps the real basis for the holding was a non-recognition of the controlling importance of the chose in action (the contract right to the prize if the wife's name were drawn). This perhaps led to treating the payment of proceeds as being substantially detached from the earlier purchase of the ticket, and therefore as

[15] 23 Tex. Jur. 126.

[16] Lee v. Lee, 247 S. W. 828 (Tex. Com. App. 1923).

being community property unless it was in the nature of a gift. De Funiak points out that such a holding does not give proper weight to the concept of acquiring property by "onerous title."[17]

Such relative non-recognition of the chose is not surprising at the date of the case (1888); another great judge, in 1901, held that an insurance policy—today one of the best-recognized choses —was not property.[18]

Mutations Doctrine as Applied to Interest on Notes Owned by Either Spouse

The following discussion will be based entirely on the mutations principle, ignoring the probable influence of statutes until the concluding page. The discussion applies to either spouse; the examples will be based on the wife's separate property.

Suppose that the wife sells her separate chattels (*e.g.*, a herd of cattle) on credit, receiving a note from the buyer. She no longer owns the cattle (except doubtless for a lien, which seems not to alter the situation on principle); she owns a note instead. She has exchanged her chattels for the contract rights evidenced by the note; therefore by mutations those contract rights should be her separate property. What are these contract rights? The right to be paid the principle and the right to be paid the interest are the most important. Therefore the contract right to be paid interest at the specified times would seem to be her separate property. Since the entire sum and substance of this chose in action is the right to money, it would be strange to say, when such money is paid, that it could be anything but the same type of property as the chose in action.[19] The payment is a sort of mutation, but is an *a fortiori* siutation; the payment is really a phase of the contract right, *viz.*, its performance. That is, the wife has sold her

[17] 1 de Funiak *op. cit. supra*, note 1 at 146 and 148.

[18] Martin v. McAllister (Brown, J.) 94 Tex. 567, 63 S. W. 624 (1901); Huie, *Community Property as Applied to Life Insurance*, 17 Tex. L. Rev. 121, 129 (1939).

[19] This argument is made as to life insurance (policy and proceeds) in Professor Huie's excellent article, *id.* at 122 and 126.

chattels for a pair of choses in action which ripen into money; therefore the choses and the money, both principal and interest, should by mutations be her separate property.

The same reasoning would seem to apply to a sale of the wife's land. The existence of an express vendor's lien with the accompanying superior title, or an implied vendor's lien, would not seem to change the result; if such temporary retention of legal title or of a lien has any effect on the problem at hand, it would seem to strengthen the conclusion reached above. In this situation several cases have held that interest is separate property.[20]

Suppose the wife lends her money. At that instant she loses all title to it; she owns a note instead. She has in effect sold her money; and the mutations principle should make what she received (including the right to interest) her separate property. The contract to pay interest cannot logically be separated from the contract to pay principal;[21] both rights are evidenced by the same note, and arise at the same instant, and both are indispensable parts of the price which the wife demanded, and without either of which she would not have made the bargain. Again, since the contract right is nothing whatever except a right to money, that money when paid would certainly seem to be the same kind of property as the chose in action.[22]

A very different theory, which most of the not very numerous cases follow and which Judge Speer[23] apparently accepts, places little or no emphasis on the contract right to interest and entire emphasis on the payment thereof. This theory treats the interest money as property acquired during marriage, without attention to its source, the contract right to interest; and since it was not acquired by "gift, devise, or descent," it is considered to be com-

[20] Scott v. Sloan, 23 S. W. 42, (Tex. Civ. App., 1893).
Carlisle v. Sommers, 61 Tex. 124 (1884).

[21] First National Bank v. J. I. Campbell Co., 114 S. W. 887 (Tex. Civ. App., 1908).

[22] See note 19 *supra.*

[23] 23 TEX. JUR., *Husband and Wife,* § 103.

munity property.[24] The theory also considers interest paid during marriage as "income" from the wife's separate property, and therefore community property. This theory is supported by the economics definition of interest as a payment in return for the use of money, and by Article 5069's definition of interest as "compensation for the use or forbearance or detention of money." Although Article 5069's definition is quite probably controlling in many situations (this is discussed *infra*), it is submitted that both of these definitions are inaccurate legally. If there is a loan, one of its fundamental elements is the instant passing of title; the money is not "used" like a bailed chattel. If land or chattels have been sold in return for notes, no money belongs to the seller which the buyer holds and uses; any money in the buyer's hands belongs to him.

This seems to prove that interest, when land or chattels are sold, is not payment for "use or detention" of money; why should the buyer pay for the use of his own money? Isn't it more realistic to consider interest as part of the price, which is greater to the extent of the interest because payment of the price is deferred? ("Compensation for detention of money" probably means additional pay for the right to delay the main payment; this fits in exactly with the foregoing argument.) The statement of interest as a per cent instead of a flat sum is probably due largely to the obvious fact that the note may not be paid when due—in which event the specified per cent continues to increase the price, with substantial fairness.

The argument in the preceding paragraph applies also to a loan, because title passes and the money belongs to the debtor. In some fields of law, the pasing of title is relatively unimportant (*e.g.*, goods in interstate commerce); but there seems to be no reason here for ignoring this basic, important fact, and the parallel to selling land or chattels on credit seems quite exact.

[24] TEX. CONST. Art. XVI, § 15; TEX. REV. CIV. STAT., (Vernon, 1948) art. 4619; *contra*, 1 DE FUNIAK *op. cit. supra*, note 1 at 146 and 148.

An interesting analogy is furnished by bailment of fungible chattels (*e. g.*, wheat). Here the identical wheat need not be returned to the bailor, because of business convenience, just as the identical money need not be returned to the lender; but here the analogy ends. The basic difference is, title to the wheat does not pass: in legal theory, it belongs to the bailor; this is controllingly important, for the bailee must keep that amount of wheat on hand and is a converter if he doesn't. On the other hand, title to money lent passes instantly, and the borrower is free to spend all of it, because it is his.

The theory that interest is "income" seems unsound on principle. Interest cannot be "income" from the property (whether chattels or land or money) which she no longer owns; it is part of the sale price of such property. It canont be income from the principal of the note, as is sometimes thought: that chose in action, or the cash with which it was paid off, was not used by the wife to produce income; in fact, the so-called income basically arose at the same instant as such principal, *viz.*, at the same instant the note was delivered.

Thus the theory very largely ignores the mutations principle, ignores the chose in action representing interest with exclusive emphasis on the money payment, and seems to misapply the concept of "income."

Let us apply the foregoing reasoning to ten fact situations, varying the dates of the loan of her money (or the sale of other property for notes), the dates of maturity and the dates of payment. The loan situation will be discussed, instead of notes arising from sale of land or chattels, because the former seems less clear, as involving money both initially and in repayment.

The discount situations will not be discussed in detail, but the results would seem to be the same. For example, suppose that instead of the borrower's receiving $100 and contracting to repay $100 plus interest from date, he receives only $95 and contracts to repay $100 at maturity (the maturity being far enough in the

future to prevent usury). Once again, the amount repaid is greater than the amount lent because of the time element: the price is greater because its payment is deferred. The creditor once again owns two choses in action (contract right to principal and contract right to interest after maturity only). The best analysis seems to be, the interest is paid in advance; this fact does not seem to change the type of property it is.

Regardless of when her money is lent or her other property is sold, and regardless of when the notes are due and are paid, the principal of the notes when paid to her will be held to be her separate money. Similarly, interest which is both due and paid before the marriage or after its dissolution, will be her money and not community property. In all other situations, the nature of the interest is less clear, with the strong tendency in the cases to hold it community property, without much analysis.

The ten situations will first be listed and then discussed separately (it will be observed that each even-numbered situation is exactly like the preceding odd number, except that the husband is the debtor instead of a third party):

1. Wife lends money to a third party during coverture. She receives notes in return bearing interest from date; these notes mature during coverture, and are fully paid during coverture.
2. Wife lends money to her husband during coverture. She receives notes in return, bearing interest from date; these notes mature during coverture, and are fully paid during coverture.
3. Wife lends money to a third party during coverture. She receives notes in return, bearing interest from date; these notes mature after the marriage is dissolved; principal and interest are paid when due.
4. Wife lends money to her husband during coverture. She receives notes in return, bearing interest from date; these notes mature after the marriage is dissolved; principal and interest are paid when due.
5. Wife lends money to a third party before marriage. She receives notes in return, bearing interest from date; these notes mature during marriage; principal and interest are paid when due.

6. Wife lends money to her husband before marriage. She receives notes in return, bearing interest from date; these notes mature during marriage; principal and interest are paid when due.
7. Wife lends money to a third party before marriage. She receives notes in return, bearing interest from date; these notes become due before marriage; principal and interest are paid during marriage.
8. Wife lends money to her husband before marriage. She receives notes in return, bearing interest from date; these notes become due before marriage; principal and interest are paid during marriage.
9. Wife lends money to a third party before marriage. She receives notes in return, bearing interest from date; these notes become due after marriage is dissolved; principal and interest are paid when due.
10. Wife lends money to her husband before marriage. She receives notes in return, bearing interest from date; these notes become due after the marriage is dissolved; principal and interest are paid when due.

1. Wife lends money to a third party during coverture. She receives notes in return bearing interest from date; these notes mature during coverture, and are fully paid during coverture.

Here the wife lends her separate money to a third party. The notes she receives in return are her separate notes; that is, they have mutated or changed their form from her separate money to her separate notes. This transaction would seem to be nothing more than a "sale" of her sole means in return for the notes, wherein title to the money passes immediately to the borrower. These notes are evidence of, and in legal theory embody, two major choses in action or contract rights (and sometimes some additional ones of less importance); these are, a right to principal at maturity and a right to interest whenever due. When the money is paid, it (interest, as well as principal) should be the same type of property as the notes which represented it. Therefore, interest in this situation should be held to be the wife's separate property.

However, as a general rule the Texas courts have held this

interest to be community property.[25] An apparent exception is where, instead of a loan, there is a sale of land for notes secured by a vendor's lien, for the cases argue that the principal and interest are inseparable when secured by the same lien (and there are no coupons representing the interest.)[26] The result reached under this exception seems right, but the reasoning seems unsound. Why should the type of security involved change the character of the whole transaction, since the debt (consisting of the promises to pay principal and interest) is the basic factor, and security is merely ancillary thereto?

2. Wife lends money to her husband during coverture. She receives notes in return, bearing interest from date; these notes mature during coverture, and are fully paid during coverture.

Here the same reasoning should apply, and the interest should be held to be the wife's separate property.[27] Two additional theories have been urged to produce this same result. First, if the husband contracts to pay interest on money borrowed from the wife's separate estate, the interest could be held the wife's separate property on the theory of a gift,[28] but this theory does not seem very realistic. Second, in order to produce the result bargained for and to enforce the contract as it was made, interest must be paid from the husband's separate estate to the wife's separate estate. If it is paid out of the husband's separate estate to the community, the wife is getting only one-half of what she bargained for, because of the husband's interest in the community estate. If interest is paid from the community estate to the wife's separate estate, again the wife gets only one-half of what she bargained for. If interest is paid from community funds and is held to be community property, the wife is not getting a penny of the

[25] Braden v. Gose, 57 Tex. 37 (1882).
Willcutt v. Willcutt, 278 S. W. 236, (Tex. Civ. App., 1925).

[26] See note 20, *supra.*

[27] See 23 TEX. JUR., *Husband and Wife*, § 62.

[28] Engleman v. Deal, 37 S. W. 42, (Tex. Civ. App., 1896), *writ of error refused*; 23 TEX. JUR. 127.

interest validly contracted for. This astonishing result was reached in a recent case.[29]

This situation seems distinguishable from the usual loan obtained by a married man, where his note is a community obligation and therefore the money borrowed belongs to the community estate.[29a] Here there is an implied (or express) agreement with the creditor-wife that payment will be made from his separate estate only; therefore the borrowed money is, as was contemplated, his separate property.

3. Wife lends money to a third party during coverture. She receives notes in return, bearing interest from date; these notes mature after the marriage is dissolved; principal and interest are paid when due.

No cases have been found involving these facts. By the same initial reasoning, the interest would seem to be, on principle, the wife's separate property. If the chose in action representing interest is ignored, the interest paid during marriage might be community property, while interest paid after the marriage ended would belong entirely to the ex-wife. A more fundamental analysis would make the chose in action govern, and its nature would be molded at the inception. If it is separate property (as the mutations principle would indicate), then interest payments during marriage would likewise be separate property and after the marriage ended would belong entirely to the former wife.

4. Wife lends money to her husband during coverture. She receives notes in return, bearing interest from date; these notes mature after the marriage is dissolved; principal and interest are paid when due.

Here again on principle the interest should be held to be the

[29] Cadwell v. Dabney, 208 S. W. (2d) 127 (Tex. Civ. App., 1948), *writ of error refused*, N.R.E.

[29a] *See* Gleich v. Bongio, 128 Tex. 606, 99 S. W. (2d) 881 (1937) and cases therein cited.

wife's separate property (or more accurately, as to interest paid after the marriage ended, her property). Courts would probably reach this result, under the same reasoning as in the second situation *supra*, when in order to give effect to the husband's contract as he made it, interest was concluded to be the wife's separate property.

5. Wife lends money to a third party before marriage. She receives notes in return, bearing interest from date; these notes mature during marriage; principal and interest are paid when due.

Here the wife lends money to a third party before marriage; interest paid to her before marriage would obviously belong to her; and the mutations principle would make the interest paid during marriage, her separate property. She entered the marriage owning the notes (*i.e.*, the choses in action represented thereby); hence interest payments would be her separate property under the constitution.[80] However, the cases have held that interest here is community property.[81]

This fifth situation appears to call clearly for a change in the prevailing rules. Most certainly the notes representing the principal and interest are the wife's separate property at the time of marriage. If interest paid thereafter is held to be community property, when did the type of property change? Three conceivable opportunities for this change appear: (1) at the instant of marriage, or (2) at maturity, or (3) at time of payment.

Under the first hypothesis, a chose in action (the contract right to interest) belonged to the feme sole, but would at the instant of marriage become a community chose; this is impossible under the constitution. Under the second hypothesis, the contract right to interest (clearly the wife's separate chose) would, as each interest installment matured, become as to the matured right a community chose; this would be an unjustifiable deprivation of

[80] TEX. CONST., *supra*, note 21.

[81] Cruse v. Archer, 153 S. W. 679, (Tex. Civ. App., 1941) *but see* Commissioner v. King, 69 F. (2d) 639 (C.C.A. 5th, 1934).

vested property rights. As to the third hypothesis, there is a superficial basis, *viz.*, the money paid as interest is property acquired during marriage not by "gift, devise, or descent." The more accurate view seems to be (as discussed *supra*) that the contract right is simply and solely a right to money, and therefore when the money is paid, it is the same type of property as the previous contract right.

6. Wife lends money to her husband before marriage. She receives notes in return, bearing interest from date; these notes mature during marriage; principal and interest are paid when due.

There seem to be no cases on these facts. On principle, the interest again appears to be the wief's separate property. Interest paid by the future husband before the marriage would unquestionably belong to the feme sole; and after marriage, interest must be her separate property (and must be paid from his separate property—discussed *supra*) if the contract made while both were single is to be performed as written.

7. Wife lends money to a third party before marriage. She receives notes in return, bearing interest from date; these notes become due before marriage; principal and interest are paid during marriage.

Here the notes mature before the marriage. This is a much stronger set of facts for holding that interest paid after the marriage is the wife's separate property. Here the right to all interest (except interest after the note's maturity) has matured before marriage; the right to the money is complete; all that remains to be done is the actual payment. Holding that such interest is community property would have to be based on the blind conception that the money was property acquired during the marriage not by "gift, devise, or descent."

8.Wife lends money to her husband before marriage. She receives notes in return, bearing interest from date; these notes become

due before marriage; principal and interest are paid during marriage.

The reasoning in the previous paragraph applies here with full force, and is further strengthened by the fact that the future husband's already matured obligation cannot be satisfied unless his interest payments after marriage are the wife's separate property.

9. Wife lends money to a third party before marriage. She receives notes in return, bearing interest from date; these notes become due after marriage is dissolved; principal and interest are paid when due.

Here the marriage seems to be irrelevant. The wife, being a feme sole at the time of making the contract and also at the time of collection, should have an absolute right to the proceeds, both principal and interest, at the times of collection. Interest paid before the marriage of course belongs to the feme sole. As to interest paid after the marriage ended, the same result would be expected. Interest paid during the marriage might be held community property but that result would seem superficial and strained in the extreme.

10. Wife lends money to her husband before marriage. She receives notes in return, bearing interest from date; these notes become due after the marriage is dissolved; principal and interest are paid when due.

Here the reasoning of the preceding paragraph applies fully, with the added factor that the husband's premarital contract cannot be performed as he wrote it unless all interest payments belong wholly to the wife.

Thus on principle in all the ten situations discussed, it seems, quite surprisingly, that interest on notes owned by the wife should be her separate property. The idea that interest on such notes is community property doubtless comes from the old Spanish law.

Also, the presumption of community property, under Article 4619, is very strong—though it seems rebutted in these situations.

The only statutes bearing on the question seem to be Articles 4616, 4614, 4623 and 5069. Article 4616 indicates backhandedly that the legislature considered such interest to be community property (by including interest in its list of four items of so-called special community property which are not subject to the husband's debts and torts.) Whether the statute's language covers all the ten situations discussed above, is at least open to question. Article 4614 clearly indicates the same legislative understanding (by including interest in its definition of the wife's separate property). The repeal in 1929 of the clause about the wife's interest does not entirely nullify its influence here. Article 4623 (stating that community property is not subject to the wife's debts for non-necessaries except her earnings and the "income, rents and revenues from her separate property") was probably intended to include interest, by the phrase "income from her separate property". The above analysis indicates that interest is not really "income" from notes, but Article 5069's definition—that interest is compensation for use or detention of money—treats interest as income, and very probably overrides the mutations principle. However, over and above the old Spanish law and even the cited statutes is the constitution, which states in very broad language: "All property . . . of the wife owned . . . by her before marriage . . . shall be her separate property."[32]

Applying this definition to notes acquired before marriage, the contract right to interest would seem clearly to be her separate property. Therefore, since the money later received should be of the same character as the chose in action, it is very possible indeed that holding such interest to be community property, infringes the constitution.

As to notes acquired after marriage, the mutations principle

[32] See footnote 4, *supra*.

should produce the result that the chose in action (the wife's contract right to be paid interest) and the subsequent interest payment are her separate property.

However, mutations is a common law principle, and would very probably be overriden by contrary statutes, such as Articles 4616 and 5069.

As to interest on the husband's notes, there is no constitutional definition of his separate property, but Article 4613 defines such property in language identical (so far as it relates to this problem) with the constitution's definition of the wife's separate property. There is no statute relating to interest on his notes except Article 5069's definition of interest. Thus the conclusions of the two immediately preceding paragraphs would probably apply here as to notes acquired by the husband before marriage. As to notes acquired after marriage, the mutations principle would suggest that all interest is separate property, unless Article 5069 and the frequently asserted policy of treating the spouses alike were held to override such principle.

It is an admirable feature of the community property system that all earnings of both spouses belong half and half to the marital partners. It is perhaps equally praiseworthy (although two-thirds of the community states have the opposite rule) that fruits, profits and income from separate property are likewise shared by both spouses; this rule indicates a generous, wholehearted partnership. However, the foregoing principles aggrandizing the community estate should certainly not embrace property which is really separate. Interest is not the fruit of separate property; on principle it *is* separate property.

It is believed that all the foregoing analysis indicates that the interest problem is not of the open and shut simplicity which is ordinarily assumed. It is submitted that in future cases involving the problems herein discussed, the rules applicable should be further analyzed and clarified, in the light of the principles suggested herein.

Oil and Gas, Timber and Perennial Crops

These three topics all have the same characteristic of being a part of the realty until severance.[33] As to oil and gas, *White v. Blackman*[34] referred to the

> "... settled law of this state that oil and gas in place is a part of the corpus of the property itself."

Perennial crops which grow spontaneously, without labor or attention, (*e. g.*, natural grass) are very different in their legal aspects from annual crops, which require cultivation. The following discussion will assume that the land under which the oil or gas lie and on which the timber and perennial crops are growing, is separate property of one of the spouses. (Of course, all the results reached would apply also to gravel, sand, stone, clay, etc.)

Oil and gas in place, standing timber, and unharvested perennial crops could be marketed in three possible ways: (a) by sale to a third party, who then drills for the oil and gas, cuts the timber, or harvests the perennial crop; (b) by such action by one spouse (or both); (c) by such action by an agent (independent contractor or servant) employed by one or both spouses.

Sale in Place to a Third Party

As to oil and gas, that would be making a so-called lease. Under the usual form of oil lease, seven-eighths of the oil in place is granted by way of determinable fee simple, the lessor retaining the royalty one-eighth, which remains a part of the realty and belongs to such spouse. When oil is brought to the surface, it becomes a chattel, one-eighth thereof still belonging to the spouse; when it is sold to a pipeline company, one-eighth of the cash is by mutations the spouse's separate property.[35] The usual form of gas lease

[33] Garza v. DeMontalvo, 213 S. W. (2d) 762 (1919); Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717 (1915); Swayne v. Lone Acre Oil Co., 98 Tex. 597, 86 S. W. 740 (1905); White v. Blackman, 168 S. W. (2d) 531 (1942); Missouri, K. & T. R. Co. v. Starr, 22 Tex. Civ. App. 353, 55 S. W. 393 (1899).

[34] 168 S. W. (2d) 531, at 534.

[35] Stephens v. Stephens, 292 S. W. 290 (Tex. Civ. App., 1927), *writ of error dismissed.*

grants all the gas in place to the lessee, who pays therefor with one-eighth of the proceeds of gas extracted; such cash is by mutations the spouse's separate property. The bonus, if any, paid by the lessee is part of the purchase price of the minerals, and therefore is by mutations separate property of the lessor.[36] Delay rentals, if any, are clearly not exactly parallel to rentals under an ordinary lease; federal cases have held they are income from the lessor's land and therefore community property,[37] but the point is possibly unsettled.

Suppose that standing timber is sold to a third party. It was in legal effect realty before he purchased it; the timber deed effects a constructive severance. Since he bought realty, the price he paid is the landowner's separate property, by mutations. The standing timber and such timber when felled of course belong to the third party.

Suppose that perennial crops are sold to a third party. The legal results seem to be exactly parallel to the timber situation; such crops seem to be separate property and the proceeds are separate property. However, in *Kreisle v. Wilson*,[38] where natural hay on the wife's separate property had matured and was ready to cut, the court held it was community personalty. Judge Speer thinks that this case is wrong.[39] How can it be said that mere maturity is enough to change a perennial crop which is separate property into community property? Any spontaneous growth of timber, grass, etc, on separate property remains separate property, for it is attached to the land and in legal contemplation is (unlike annual corps in most situations) a part of the land.

No case has been found where a crop requires no annual attention, but did originally require community labor to set out roots,

[36] Commissioner of Internal Revenue v. Wilson, 76 F. (2d) 766 (C.C.A. 5th, 1935); Ferguson v. Commissioner of Internal Revenue, 45 F. (2d) 573 (C.C.A. 5th, 1930); Turbeville v. Commissioner of Internal Revenue, 84 F. (2d) 307 (C.A.A. 5th, 1936).

[37] Commissioner of Internal Revenue v. Wilson, *Ibid.*

[38] 148 S. W. 1132 (Tex. Civ. App. 1912).

[39] Note 31, *supra.*

plant trees, etc. Such a crop is ordinarily treated as perennial. Whether it is, before harvested, community or separate property is not clear; very possibly it is all community property. Whichever it is, the proceeds upon sale to a third party (who then harvests) should be the same.

Ordinary annual crops, such as cotton or corn, are community property—apparently before severance as a ramification of the doctrine of emblements, and certainly after severance. Thus when sold, the proceeds will by mutations be community property.

As discussed under other topics of this article, the principle of preserving separate property when sold, through the mutations concept, competes with the principle that the spouses' labor belongs to the community. Applying these principles here (where there is a sale of unsevered minerals, timber, or perennial crops to a third party), the time and attention of one or both spouses required to effect such a sale of separate property apparently do not prevent the entire proceeds' being separate property. (Apparently a sale of such property never results in community property unless there are multiple sales and purchases amounting to a business.) That is, such community labor—which is ordinarily not relatively great or prolonged—does not prevent the full operation of the mutations principle, whereby separate property becomes separate property in a changed form. A leading case expresses this result as to oil and gas as follows:

> "Appellant (the wife) had nothing to do with the transaction, and the only skill exercised or labor performed by appellee (the husband) was leasing the land and receiving the proceeds for his part of the oil produced. These facts do not convert his separate into community property."[40]

However, as to ordinary annual crops—which as contradistinguished from oil and gas, timber, and perennial crops, must be produced before they can be severed—the amount of community labor is ordinarily much greater. Such crops are held to be com-

[40] Note 35, *supra.*

munity property, apparently even in extreme situations where community labor is at a minimum and all other elements involved are separate property of one spouse. A leading case, *De Blanc v. Lynch*,[41] involved crops where the land was the wife's and the cultivation was done by her slaves. Apparently the only community element was the community labor of supervision; yet the court held the entire crop to be community property, saying:

> "If a crop is made by the labor of the wife's slaves on the wife's land, it is community property, because the law presumes that the husband's skill or care contributed to its production, or that he, in some way, contributed to the common acquisitions."

If the community supervision was reduced to zero by a five-minute hiring of a capable farm manager with separate funds, the crop would be much less clearly community, but even with the community element so reduced, the result would very probably be the same. Crops even with such a slight community tincture seem within the old Spanish rule that "fruit of separate property" was community property, in a sense that sand or Johnson grass are not.

Severance by the Spouses

Suppose that one spouse, or both, drill for oil and gas or cut the timber or harvest the perennial crop. Though there is an immense disparity in the values of the products, the problem seems essentially the same whre an oil well is drilled as where an acre of perennial hay is cut. Here the amount of community labor is vastly greater than in the preceding situation (sale in place to a third party), and the tendency will be to hold the entire product to be community property. That result will be somewhat strengthened if community money is used; *e.g.*, for equipment. However, use of community funds would seem to create a mere debt (unless there was a gift to the spouse owning the land), rather than to

[41] 23 Tex. 25 (1859).

have a title-molding effect.[42] It is believed that Judge Speer's contrary indication[43] is open to question.

There seem to be only two old Texas cases[44] on this topic or the next (severance by an agent). Their value is greatly lessened by the fact that they involve not only severance of timber and clay, but also the processing thereof into lumber and bricks—of course with increased community supervision. Judge Speer, relying heavily on these two cases, says:

> "Where, however, the community funds, labor, care or service whatsoever, enter into the acquisition of the new product—that is, the mineral, timber and the like in its new status as personal property—it thereby becomes impressed with the community character.... (stating the two old cases).... From analogy it would seem that timber, hay, fuel, minerals, soil, gravel, rock, sand, water and the like, found upon the separate land, when removed therefrom by the husband or wife, either directly or through the instrumentality of others, and the proceeds of such things when sold, would likewise belong to the community."[45]

Judge Hutcheson has quoted that conclusion with approval.[46]

However, with the greatest respect for these eminent authorities, perhaps the conclusion should be questioned. There seems to be little justification for holding the entire product to be community property except the difficulty of tracing and segregating the value of the separate, unsevered property and the community labor and funds used to sever it. Such an oversimplified holding would seem somewhat grotesque in the case of a highly productive oil well. The fact that the unsevered property was separate should be recognized, on the ground that there is sufficient added utility of form

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[42] Miller v. Odom, 152 S. W. 1185 (Tex. Civ. App. 1912), *writ of error refused*; Wehring v. Schumann, 83 S. W. (2d) 1112, (Tex. Civ. App., 1935); Gleich v. Bongio, 128 Tex. 606, 99 S. W. (2d) 881 (1937); Goddard v. Reagon, 8 Tex. Civ. App. 272, 28 S. W. 352 (1894).

[43] SPEER, LAW OF MARITAL RIGHTS pp. 500 and 501 (3rd. ed. 1929).

[44] White v. Lynch, 26 Tex. 195 (1862); Craxton, Wood & Co. v. Ryan, 3 Will. Civ. Cas. App. § 367 (1888).

[45] 23 TEX. JUR. 122; also 23 TEX. JUR. 78 and SPEER, *op. cit. supra*, note 43 at 446.

[46] Welder v. Comm. of Internal Revenue, 148 F. (2) 583 (C.C.A. 5th, 1945).

or place to amount to a mutation, or on the persuasive ground that the severed product is substantially the same property—the same oil or timber or hay—as while unsevered. In the absence of proof of the relative values involved, the presumption of community property would of course make the entire product community property;[47] and Judge Speer considers such proof impossible.[48] If the values can be proved, a very strong argument can be made for some sort of allocation between separate and community estates.

Community property is not defined in the constitution (while one type of separate property—the wife's—is); and the statute (Article 4619) defines it as marital property "except that which is separate property"—which indicates that if the separate property can be traced and its value proved, it must not be turned into community property.

The title could be divided between the separate and community estates in co-tenancy, or it could all be in one estate with compensation to the other. If title were divided, it would be *pro rata*, based on the value of the unsevered item and the value of community labor (and possibly community funds, though treating such funds as a debt seems much better.) If the severed product is worth more than its value when unsevered plus the value of the community labor and funds (which is likely, for example, as to timber), some more or less arbitrary allocation of the surplus value (possibly *pro rata*) could be made, with perhaps a tendency to favor the community estate. As to proof of the value of the unsevered items, such proof could be made as to timber and doubtless as to unharvested perennial crops; as to oil and gas in place, it would be difficult, but should be possible with sufficient accuracy by using income tax formulae or the methods for evaluating oil and gas reserves.

The best solution would seem to be, the entire product as sepa-

[47] SPEER, *op. cit. supra*, note 43, § 363.
[48] 23 TEX. JUR. 78.

rate property, with a right of reimbursement in the community for the value of its labor and for its funds, probably with a lien or charge as security. (The exact converse—the entire product to be community property, with reimbursement of the separate estate—would theoretically produce the same net result, but this probably seems to be letting the tail wag the dog.) Such a rule would be supported by the rather close analogy of improving a separate estate with community funds, in which case the property remains separate and the community has a right of reimbursement.[49] Such a rule would appear to do justice whether the values involved were small or very great.

The situation here seems controllingly similar to sale in place to a third party, where the community labor did not have a title-molding effect.

Another community element might be, paying the agent with community money; that would seem to be mere loan from the community estate to a separate estate, and ought not to mold the title to the severed product.

There would be another community element if a servant was employed; *viz.*, supervision by one spouse or both—which would not be present if an independent contractor is utilized. (One of the two old cases[50] mentioned under the preceding topic involved slaves, and therefore doubtless much supervision.)

If the value of the community elements of hiring and supervision were not proved, the full value of the product would seem to be community property, on the basis of the familiar presumption. However, it is believed such values could be sufficiently proved, on the basis of the amount of time spent by the spouse in hiring and supervising; at worst, the total duration of the agent's work, multiplied by the per diem value of the spouse's services, would produce a maximum valuation for the community elements which would certainly be fair to the community estate.

[49] Gandy, *Improvement of Marital Property With Funds From Another Estate*, 4 SOUTHWESTERN L. J. 100 (1950).

[50] White v. Lynch, 26 Tex. 195 (1862).

If such community values were proved, some apportionment would seem to be equitable. The solutions suggested under the preceding topic, where a spouse does the necessary work, would seem to apply here also.